89-1611
No.

In The

Supreme Court of the United States

October Term, 1989

TIMOTHY SCOTT REESE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Whether a search warrant issued for the premises and effects of a particular person may be constitutionally extended by police officers to include a search of the personal effects of a visitor to the subject premises?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioner, Timothy Scott Reese, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania, which became final on January 5, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 520 Pa. 29, 549 A.2d 909, and is reprinted in the appendix hereto, page 3a. The opinion of the Pennsylvania Superior Court

is reported at 360 Pa. Super. 347, 520 A.2d 491, and is reprinted in the appendix hereto, page 15a. The opinion of the trial court, the Luzerne County Court of Common Pleas, was not reported, but is reprinted in the appendix hereto, page 19a.

The Pennsylvania Supreme Court remanded the case to the Pennsylvania Superior Court. The memorandum decision of the Superior Court was not reported, but is reprinted in the appendix hereto, page 13a. A petition for allowance of appeal was filed with the Pennsylvania Supreme Court, which petition was denied in an order dated January 5, 1990. That order is reprinted in the appendix hereto, page 1a.

STATEMENT OF JURISDICTION

On January 29, 1987, the Superior Court of Pennsylvania vacated the judgment of sentence entered following the petitioner's conviction for the offense of possession of a prohibited offensive weapon. The Superior Court vacated the judgment of sentence upon grounds that the offensive weapon was obtained as a result of an unlawful search and seizure. In view of its disposition of the search issue, the Superior Court did not address the remaining issues preserved by the petitioner for appellate review. The Commonwealth's petition for allowance of appeal was granted by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court, on October 25, 1988, reversed the order of the Superior Court, ruling that the seizure of the offensive weapon was constitutionally permissible, and remanded the case to the Superior Court for disposition of the additional issues preserved for appellate review.

The petitioner's application for reargument in the Pennsylvania Supreme Court was denied on January 9, 1989. The Superior Court, on remand from the Pennsylvania Supreme Court, decided the claims not previously addressed adversely to the

petitioner, and the petitioner sought allowance of appeal in the Pennsylvania Supreme Court. The petition for allowance of appeal was denied by the Pennsylvania Supreme Court on January 5, 1990.

Pursuant to Rule 13 of the Rules of the Supreme Court of the United States, the time for filing a petition for writ of certiorari began to run on January 5, 1990, and expires on April 5, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The petitioner's arrest arose out of a search which was conducted by police on March 22, 1985, at an apartment situate at 93 Main Street, Luzerne, Pennsylvania. The search was

conducted pursuant to a warrant which was issued on the same date. The warrant, attached hereto in the appendix at page 26a, authorized a search of the apartment and the person of one Tina Cosgrove, the resident of the apartment. The warrant identified the items to be searched for and seized as controlled substances, paraphernalia, and records associated with the distribution of controlled substances. Although the affidavit of probable cause in support of the search warrant named the petitioner as an associate of Ms. Cosgrove, indicated that he had been observed in the apartment, and identified him as a "known drug user", the warrant did not authorize a search of either the petitioner or his personal effects. Mr. Reese was not a resident of the subject premises.

The warrant was executed by six police officers at 8:20 P.M. The night was a cold one. As the officers arrived at the apartment, an adult individual named Metzger was entering the apartment. Upon entering the apartment, which was very small, the police found Ms. Cosgrove, her three children, two of whom were teenagers, the petitioner, Timothy Reese, another adult male named Dunbar, and Mr. Metzger. Ms. Cosgrove and Mr. Reese were in the kitchen of the apartment at the time of the officers' entry. The officers immediately conducted a pat-down search of those present in the apartment; after the pat-down, one of the officers, Trooper Carl Allen, read the warrant to Ms. Cosgrove. The officers then commenced their search.

During the course of the search, Trooper Allen observed a black leather jacket hanging over the back of a kitchen chair. The petitioner was standing within reach of the jacket. Without first ascertaining ownership of the jacket, Trooper Allen searched the pockets of the jacket and discovered a set of metal knuckles. Mr. Dunbar and Mr. Metzger were wearing jackets at the time of the search. Immediately after the discovery of the metal knuckles, the petitioner was asked whether the jacket was his,

and he responded that it was. He was thereupon arrested for possessing the metal knuckles. Upon leaving the apartment after his arrest, the petitioner wore the jacket.

During the course of the search, the petitioner made no attempt to conceal or destroy any contraband, nor did he threaten any of the officers. Mr. Reese's demeanor during the search was described as subdued. At no time did Mr. Reese consent to a search of his person or effects.

How the Federal Question Was Presented

In his omnibus pretrial motion, set forth at appendix page 32a, the petitioner raised the issue of the legality of the search and seizure of the metal knuckles, specifically citing the Fourth and Fourteenth Amendments to the United States Constitution. The suppression court and the trial court ruled that the search was not violative of the petitioner's constitutional rights. The portion of the record containing the suppression court's ruling and the trial court's opinion is set forth in the appendix at page 37a. The issue of the legality of the search and seizure was preserved for appellate review, and the Pennsylvania Superior Court vacated the trial court's judgment of sentence upon grounds that the search and seizure was unlawful, and that the metal knuckles should have been suppressed. The Superior Court held that the search of the petitioner's jacket was not within the scope of the warrant because the circumstances surrounding the examination of the jacket all argued the conclusion that it belonged to Reese and could not have been part of the general contents of the room. The Superior Court stated the general rule that a search warrant issued for the premises or effects of a particular person cannot be extended by police officers to include a search of things not belonging to or under the control of that person. The Pennsylvania Supreme Court reversed the Superior Court stating that "there is a constitutional difference between the search

of a visitor's person and the search of a visitor's personal property (property which is not on the person) located in premises where a search warrant is being executed . . . ." The majority relied upon the case of *United States v. Ross,* 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982) in reaching its conclusion. Chief Justice Nix of the Pennsylvania Supreme Court filed a dissenting opinion, in which he was joined by Mr. Justice Zappala.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below is in conflict with decisions and principles of the United States Supreme Court.

In the instant case, the Pennsylvania Supreme Court allowed police to extend the scope of a search warrant for the premises and effects of a particular person to include a search of things not belonging to or under the control of that person, that is, to include the personal effects of a visitor to the premises. In so holding, that court specifically stated its belief that "there is a constitutional difference between the search of a visitor's person and the search of a visitor's personal property (property, which is not on the person) located on premises where a search warrant is being executed".

The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." A person does not lose the protection of the Fourth Amendment by entering the apartment of another. *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Neither do a person's effects. The Fourth Amendment permits no lesser protection for a person's effects than for his person. So long as a person seeks to preserve his effects as private, even

if they are accessible to the public or to others, they are constitutionally protected. *Katz, supra.* As such, the leather jacket which the petitioner brought with him on a visit to a friend's home retained its constitutional protection. To state that there is a constitutional difference between the search of a visitor's person and the search of a visitor's personal effects located on premises where a search warrant is being executed is thus in conflict with decisions and principles of the Supreme Court of the United States.

II.

The decision of the court below is in conflict with the decisions and principles of another state court of last resort and of a United States Court of Appeals.

It is settled beyond peradventure that if a warrant sufficiently describes the premises to be searched, this will justify a search of those personal effects found therein belonging to the person occupying the premises, if those effects might contain the described items. In the instant case, then, if the officers executing the warrant for cocaine found in the premises a matchbox and wallet, these items could be searched, because they are plausible repositories for the cocaine. A question arises, however, if the search is extended to include personal effects which are the property of some other person, as is the leather jacket in the instant matter. Some courts appear not to view this as a critical fact, as they apply nothing more than the aforementioned limitation that the items sought must be, by their nature, concealable within the object searched. It has been held that a search warrant for a barber shop justifies a search of coats which customers have placed on a hook or coatrack because the narcotics sought "might be located" therein. *Commonwealth v. Snow,* 363 Mass. 778, 298 N.E. 2d 804 (1973). The assumption appears to be that by hanging the coat on the hook the customer has placed it beyond his immediate

control and possession to such a degree that the prohibition upon search of the person of the customer does not extend to the coat. This is the approach which the Pennsylvania Supreme Court took in deciding the petitioner's case.

That approach has been rightly criticized. As stated in *United States v. Micheli,* 487 F.2d 429 (1st Cir. 1973):

> A focus on actual physical possession is too narrow, however, in that it would leave vulnerable many personal effects, such as wallets, purses, cases or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage. The Fourth Amendment's basic interest in protecting privacy . . . and avoiding unreasonable governmental intrusions . . . is hardly furthered by making its applicability hinge upon whether the individual happens to be holding or wearing his personal belongings after he chances into a place where a search is underway. The rudest of governmental intrusions into someone's private domain may occur by way of a search of a personal belonging which had been entrusted to a nearby hook or shelf.

Thus, the decision of the Pennsylvania Supreme Court in the petitioner's case conflicts with the principle set forth by the First Circuit Court of Appeals in *Micheli.*

In further contrast with the Pennsylvania Supreme Court's decision in the petitioner's case, the Colorado Supreme Court held in *People v. Lujan,* 174 Colo. 554, 484 P.2d 1238 (1971) that, as personal property of a guest in the premises, a purse was not subject to search under the search warrant, where the facts suggested that the guest did not have physical possession of the

purse at the time the warrant was executed. Similarly, the Pennsylvania Supreme Court refused, in *Commonwealth v. Platou,* 455 Pa. 258, 312 A.2d 29 (1973), to uphold a search of the suitcases of a visitor to an apartment under search by warrant even though the suitcases were not in the possession of the visitor at the time of police entry or search. *Platou* was directly overruled by the Pennsylvania Supreme Court in its decision in the petitioner's case.

III.

The decision of the court below is in error.

As indicated above, the Pennsylvania Supreme Court's statement in the petitioner's case that "there is a constitutional difference between the search of a visitor's person and the search of a visitor's personal property (property which is not on the person) located on premises where a search warrant is being executed" is in conflict with decisions and principles of this Honorable Court. Further, in the instant case, the Pennsylvania Supreme Court stated that "police are not prohibited from searching a visitor's personal property (not on the person) located on premises in which a search warrant is being executed when that property is part of the general contents of the premises and is a plausible repository for the object of the search". While assuming the accuracy of this statement, the court's conclusion that Mr. Reese's jacket was a part of the general contents of the premises is not borne out by the facts of the case, and is erroneous.

Were Mr. Reese a resident of the premises, his act of removing his jacket and draping it over a kitchen chair would render the jacket a part of the general contents of the premises. As general contents of the premises, some control over the jacket would be imputed to Ms. Cosgrove, and the jacket could thus be searched pursuant to the warrant for her premises. However, what is true

for a resident does not apply to a visitor, as the imputation of control to Ms. Cosgrove cannot be made in that situation. A visitor to an apartment on a cold night would not abdicate any control over his jacket. As such, Mr. Reese's status as a visitor is significant in reaching the conclusion that his jacket was not a part of the general contents of the room. Further, as indicated by the Pennsylvania Superior Court, the circumstances surrounding the examination of the jacket all argue the conclusion that it belonged not to Cosgrove, but to Reese, and could not have been logically determined to be a part of the general contents of the room. These circumstances include the petitioner's proximity to his jacket, its obvious appearance as a man's jacket, and the fact that the petitioner, and not Ms. Cosgrove or any of the other individuals in the apartment, was asked about the ownership of the jacket. Based upon these facts, as well as the awareness of the police of Mr. Reese's status. *viz.* the mention of him in the affidavit of probable cause in support of the warrant, the police had reason to believe, and apparently did believe, that the jacket was Reese's, and not Cosgrove's. In light of the above, the police could not logically have determined the jacket to be a part of the general contents of the premises subject to the search. Under the circumstances, it would have been logical, as well as good police practice, for the officers to first ask Ms. Cosgrove whether the jacket was hers before searching it; in that way, had she indicated that the jacket was not hers, a warrant could have been secured to search the jacket. Given the fact that the small apartment was secured by six police officers, that a weapon pat-down was conducted by the officers upon their entering the apartment, and that no exigent circumstances were evident, the securing of a warrant to search the jacket would have caused little inconvenience to the officers and would in no way have jeopardized their safety.

Further, the Pennsylvania Supreme Court relied upon *United States v. Ross, supra,* in deciding to allow the search warrant for Ms. Cosgrove's person and premises to extend to a visitor's

personal property. As is indicated by Justice Nix of the Pennsylvania Supreme Court in his dissent in the instant case, reliance upon *Ross* is clearly misplaced because the critical issue in that case concerned probable cause and not the particularity of the search as described in a warrant. Thus, based upon the foregoing analysis, the petitioner would respectfully suggest that the court below erred in deciding his case.

IV.

Supreme Court review of the decision of the court below is important and necessary.

The instant case involves legal principles which, at least on their face, are in conflict. The first is the position taken in some jurisdictions that the searching authority conferred by a valid warrant to search premises extends to all objects within the premises likely to contain the things named in the warrant. The second is that an individual is constitutionally entitled to know that wherever he may be, he and his effects will remain free from unreasonable searches, and in particular that the fortuity, of the presence of his person or effects at a place named in a search warrant alone will not cause him to forfeit his right to personal privacy. Different federal and state courts have resolved the tension between these important principles in different ways and, as such, the decisions of the lower courts, both federal and state, are in conflict. Some of these decisions also appear to be in conflict with the decisions and principles enunciated by this Honorable Court. As such, the authoritative voice of the Supreme Court is needed to resolve these conflicts. Further, a resolution of these conflicts is important not only to the litigants in this case; many individuals other than the litigants will be affected by the question presented.

CONCLUSION

For the foregoing reasons, the petitioner, Timothy Scott Reese, prays that this Honorable Court grant his petition for writ of certiorari to review the decision of the Pennsylvania Supreme Court, which decision became final on January 5, 1990.

Respectfully submitted,

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APPENDIX A — ORDER OF PENNSYLVANIA SUPREME COURT DENYING PETITION FOR ALLOWANCE OF APPEAL

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

January 8, 1990

Frank W. Nocito, Esquire
63 Pierce Street
Kingston, PA 18704

RE: Commonwealth of Pennsyvlvania v. Timothy Scott Reese, Petitioner
NO. 304 E.D. ALLOCATUR DOCKET 1989

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"January 5, 1990.

Petition Denied.

Per Curiam."

Very truly yours,

s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

Appendix A

/mz
cc: Joseph C. Giebus, Esquire
Hon. Patrick J. Toole, Jr.

APPENDIX B — OPINION OF THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 150 E.D. Appeal Docket 1987

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

TIMOTHY SCOTT REESE,

Appellee

Appeal from the Order of the Superior Court of Pennsylvania Entered January 29, 1987 at No. 478 Philadelphia 1986 Vacating the Judgement of the Luzerne County Court of Common Pleas Entered December 17, 1985 at No. 691, 1985.

360 Pa. Super. 347, 520 A.2d 491 (1987)

SUBMITTED: April 15, 1988

OPINION OF THE COURT

JUSTICE ROLF LARSEN FILED: October 25, 1988

The question presented in this case is whether the search of a jacket found on a chair in an apartment, belonging to a visitor (Appellee) to the apartment, was included within the scope of a warrant to search the apartment for drugs and other contraband.

Appendix B

Members of the Pennsylvania State Police, Drug Law Enforcement Division, obtained a search warrant for 93 Main Street, Apt. D in Luzerne, Pennsylvania. The warrant authorized the search of the premises and of the person of Tina Cosgrove an occupant of Apt. D, for cocaine, other controlled substances and any paraphernalia and records associated with the distribution of controlled substances. The search warrant and affidavit also noted that Appellee, Timothy Scott Reese, was an associate of Cosgrove, had been observed in the apartment and had been a target of drug law enforcement investigations.[1]

The search of the Cosgrove residence was executed on March 22, 1985. Upon entering the apartment, the police found Cosgrove and Reese in the kitchen, read the warrant and began the search. Officer Carl Allen, who was assigned to watch Cosgrove and Reese, noticed a black leather jacket that was draped over a kitchen chair approximately four feet away from him. Without knowing who the jacket belonged to but suspecting that it may contain contraband, the officer searched the jacket and found "brass knuckles." Reese acknowleged ownership of the jacket and was arrested and charged with the possession of "brass knuckles" a prohibited offensive weapon under the Crimes Code. 18 Pa. C.S.A. § 908 (Purdons, 1983).

Prior to trial, Reese filed a motion to suppress evidence of

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1. The affidavit of probable cause stated in pertinent part:

> 7. According to Confidential Informant, one Timothy Reese, an associate of Cosgrove has been observed in Apt. D at the 93 Main Street address. Reese is a known drug user and has been the target of law enforcement investigations of the Region VIII Strike Force at Kingston.

the "brass knuckles" which was denied by the suppression court after a hearing. At trial the "brass knuckles" were admitted into evidence and the jury found Reese guilty of possessing a prohibited offensive weapon. He was sentenced to two and one-half months to twenty-three and one-half months imprisonment. The trial judge denied Reese's motions in arrest of judgment and for a new trial.

On appeal, the Superior Court vacated the judgment of sentence on the ground that the suppression court erred in not suppressing the "brass knuckles". That court held that search of Reese's jacket was not within the scope of the warrant because "the circumstances surrounding examination of the jacket all argue the conclusion that it belonged . . . to Reese" and could not have been "part of the general content of the room." *Commonwealth v. Reese*, 360 Pa. Super. 347, 520 A.2d 491 (1987). The Commonwealth petitioned this Court for allowance of appeal. We granted allocatur and we now reverse.

The Fourth Amendment of the United States Constitution requires that "no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched and the persons or things to be seized". U.S. Const. amend IV. Similarly, the Pennsylvania Constitution states that "no warrant to search a place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause." Pa. Const. art. 1 § 8. The major purpose of the particularity requirement is to prevent general searches. This "requirement ensures that the search will be carefully tailored . . . and will not take on the character of the wide-ranging exploratory searches the Framers [of the United States Constitution] intended to prohibit." *Maryland v. Garrison*, 480 U.S. ____ , 107 S. Ct. 1013, 1017, 94 L.Ed.2d 72, 80 (1987).

Appendix B

This Court in *Commonwealth v. Reece*, 437 Pa. 422, 263 A.2d 463 (1970), held that a person's (visitor's) mere presence in a private residence in which a search warrant is being executed does not, without more, justify a search of that person under the authority of the search warrant. Additionally, in *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973), this Court held that the search of the personal property of a visitor to an apartment was not within the scope of a warrant to search the premises. In so holding this court stated:

> While recognizing the applicability of *Reece* to the present case, the Commonwealth has attempted to distinguish it. The only factual distinction is that the search in *Reece*, was of the guest's person and here the search was of the guest's effects. *There is no constitutional difference.*

Id. at 266, 312 A.2d at 34 (emphasis added). Since we now believe there is a constitutional difference between the search of a visitor's person and the search of a visitor's personal property (property which is not on the person) located on premises where a search warrant is being executed, we overrule our decision in *Platou*.

Where a search warrant adequately describes the place to be searched and the persons and/or things to be seized the scope of the search "extends to the entire area in which the object of the search may be found" and properly includes the opening and inspection of containers and other recepticles where the object may be secreted. *United States v. Ross*, 456 U.S. 798, 820-821 (1982). As the Court in *Ross* noted:

> . . . a warrant that authorizes an officer to search a home for illegal weapons also provides authority

> to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search.

Id. at 821-822. Thus, the scope of a lawful search is "defined by the *object* of the search and the *places* in which there is probable cause to believe that it may be found."[2] *Maryland v. Garrison*, 480 U.S. ____ , 108 S. Ct. 1013, 94 L.Ed. 2d 72 (1987), citing *Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (emphasis added).

Clearly, the police are not prohibited from seaching a visitor's personal property (not on the person) located on premises in which a search warrant is being executed when that property is part of the general content of the premises and is a plausible repository for the object of the search. Otherwise, it would be impossible for police to effectively search a premises where visitors are present because they would not know which items, clothing and containers could be searched and which could not be searched.

In *Ross* the court recognized that "[w]hen a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and

---

2. Just as the court in *Ross* noted that probable cause to believe "undocumented aliens are being transported in a van will not justify the search of a suitcase", *United States v. Ross*, 456 U.S. 798, 824 (1982), we do not suggest that the police in this case could have properly searched Reese's jacket had they been looking for an elephant.

containers, must give way to the interest in the prompt and efficient completion of the task at hand." *Id.* at 821-822. In this same vein it would be ineffective and unworkable to require police officers to make the distinction between which articles of clothing and personal property belong to the resident and which belong to the visitor before beginning the search. It would not be reasonable to require police officers executing a warrant to ask individuals located on the premises whether they own various items of personal property nor, would it be reasonable to expect an appropriate response were they required to do so.

Furthermore, in *Ybarra v. Illinois*, 444 U.S. 85 (1979) Justice William Rehnquist, writing a dissent for the United States Supreme Court, made a telling point when he stated that "an absolute bar to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket." *Id.* at 102. And so too, visitors to the premises could frustrate the efforts of police by placing contraband among their unworn personal effects or by announcing ownership of various articles of clothing and containers in order to place those items beyond the scope of the warrant. We cannot sanction any rule that through fraud and gamesmanship erects barriers to the effective and legitimate execution of search warrants.

In this case Officer Allen testified that he noticed a black leather jacket hanging over the back of a chair about four feet away from where he was standing. He made a decision to search the jacket "because it's a common place where either contraband could be hidden or weapons." (Notes of Testimony at p. 39 Sept. 17, 1985). The jacket was not being worn by Reese and therefore, cannot be characterized as an extension of his person so as to propel its search into a search of Reese's person. We therefore hold that the police were justified in searching Reese's jacket

pursuant to the lawful search warrant since that property was part of the general content of the room and was a plausible repository for the object of the search.

Accordingly, we reverse the order of the Superior Court and remand the case to the Superior Court for disposition of the remaining issues preserved for appellate review.

Mr. Chief Justice Nix files a dissenting opinion in which Mr. Justice Zappala joins.

Appendix B

No. 150 E.D. Appeal Dkt. 1987

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

TIMOTHY SCOTT REESE,

Appellee

Appeal from the Order of the Superior Court of Pennsylvania Entered January 29, 1987, at No. 478 Philadelphia 1986 Vacating the Judgment of the Luzerne County Court of Common Pleas, Entered December 17, 1985, at No. 691, 1985.

360 Pa. Super. 347, 520 A.2d 491 (1987)

SUBMITTED: April 15, 1988

DISSENTING OPINION

NIX, C. J. FILED: October 25, 1988

The result reached by the majority is in direct contravention of *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973), where this Court held that a valid search warrant of the premises does not extend to the personal property of a visitor to the premises. I dissent because I am not convinced that there is any

legitimate reason for overruling the holding in that case.

The United States Constitution protects people from unreasonable searches and seizures, and states that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the person or things to be seized." U.S. Const. amend. IV. The Pennsylvania Constitution similarly provides that "no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause . . . ." Pa. Const. art. 1, § 8. In *Platou, supra*, we explained that

> "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."
>
> 455 Pa. at 263-64, 312 A.2d at 33 (*quoting Marron v. United States*, 275 U.S. 192, 196 (1927)).

Today, the majority overrules *Platou*, declaring that the scope of a search warrant properly includes the personal property of a visitor to the premises being searched. I cannot join that decision because I am not persuaded that *United States v. Ross*, 456 U.S. 798 (1982), is an indication that the United States Supreme Court would permit a search warrant of premises to extend to a visitor's personal property. Reliance on *Ross* is clearly misplaced because the critical issue in that case concerned probable cause and not the particularity of the search as described in a warrant.

Appendix B

Moreover, it is significant to note that even though both the United States Constitution and the Pennsylvania Constitution require particularity and probable cause, the order in which those two requirements are addressed differs. While the United States Constitution addresses probable cause first, the Pennsylvania Constitution addresses *particularity* first. This strongly suggests that in our Commonwealth particularity and probable cause are given at least equal importance. It would be inconsistent with the Pennsylvania constitutional formulation to suggest that, because of the degree of probable cause present in a given factual setting, the standard of particularity required can be lessened. Probable cause and the degree of particularity are two separate and distinct factors that must be considered in a judgment as to whether or not the constitutional mandate has been complied with. The strength of one requirement does not erode the mandate of the other. Hence, the fact that the standard of probable cause may be eminently clear in a given case cannot justify a relaxation of the degree of particularity that is required. The particularity requirement is not merely an appendage. A reading of the analysis of the majority suggests that they fail to appreciate this critical point.

In light of the foregoing, I believe that *Commonwealth v. Platou, supra*, should be reaffirmed. To permit a police officer to extend the scope of a warrant to include property and persons not described in the warrant effectually takes away rights guaranteed to the citizens of this Commonwealth. Even if the personal property of a visitor located on premises being searched can properly be searched by a police officer under the United States Constitution, that type of conduct is clearly impermissible under the Pennsylvania Constitution.

I, therefore, dissent.

Mr. Justice Zappala joins in this opinion.

APPENDIX C — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00478 Philadelphia 1986

COMMONWEALTH OF PENNSYLVANIA

vs.

TIMOTHY SCOTT REESE, Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas of Luzerne County, Criminal at No. 691 of 1985.

BEFORE: CIRILLO, P.J., MONTEMURO AND JOHNSON, JJ.

MEMORANDUM: Filed: February 28, 1989

This case comes before us on remand from our supreme court.

Appellant was convicted of possession of a prohibitad offensive weapon[1] after police discovered a set of brass knuckles in a jacket belonging to appellant during a drug search of an apartment appellant was visiting. On appeal six issues were raised. It was contended, inter alia, that the jacket, which was hanging on a chair, had not been a legitimate object of search, and that the brass knuckles should have been suppressed. Because this court agreed with the suppression argument, *Commonwealth v. Reese*, ____ Pa. Super. ____ , 520 A.2d 491 (1987), the remaining issues

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1. 18 Pa. C.S.A. § 908.

were not treated. Our supreme court reversed, *Commonwealth v. Reese*, ____ Pa. ____ , ____ A.2d ____ (No. 150 E.D. Appeal Dkt. 1987, filed October 25, 1988), and remanded to this court for disposition of those claims not previously addressed.

Appellant assigns error to the trial court's denial of his demurrer to the charge of prohibited offensive weapons; its denial of his motion for sequestration of prosecution witnesses; its denial of his motion *in limine* regarding prior criminal convictions; its refusal to grant certain of his points for charge; and its instruction of the jury concerning affirmative defenses. After thoroughly reviewing the record of this case we find that all of these issues have been adequately addressed and properly disposed of by the opinion of the trial court. Accordingly, we affirm on that basis.

Judgement of sentence affirmed.

APPENDIX D — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00478 Philadelphia 1986

COMMONWEALTH OF PENNSYLVANIA

vs.

TIMOTHY SCOTT REESE, Appellant.

Appeal from the Judgment of Sentence of the Court of Common Pleas of Luzerne County, Criminal Law, at No. 691 of 1985.

BEFORE: CIRILLO, P.J., MONTEMURO and JOHNSON, JJ.

OPINION BY MONTEMURO, J.: FILED JAN 29 1987

This is an appeal from judgment of sentence entered following appellant's jury conviction for possession of a prohibited offensive weapon, specifically a device commonly referred to as brass knuckles.[1]

Appellant has presented us with six issues. In view of our disposition of the first of these, we need not address the others.[2]

Appellant contends that the weapon he stands convicted of

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1. 18 Pa. C.S.A. § 908.

2. Appellant also assigns error to the court's denial of his sequestration motion, of his motion in limine and of certain requested points for charge. He objects as well to certain of the jury instructions.

possessing was illegally seized and should have been suppressed. The knuckles were obtained by police while executing a search warrant of an apartment belonging to one Tina Cosgrove, an associate of appellant's.

The warrant, which had been issued pursuant to police information that Cosgrove was involved in drug sales from the apartment, listed as its objectives controlled substances, drug paraphernalia and records relating to sales. At the time of the search, appellant was a visitor to the apartment, and although named in the affidavit of probable cause, was not mentioned as a target of the search.

When police entered the premises, appellant and Cosgrove were in the kitchen. On the back of a chair some 4 feet from where appellant stood was draped a black leather jacket. Without first ascertaining its ownership, police reached into the pockets, discovering the knuckles. Appellant, upon inquiry, acknowledged possession of the jacket and was placed under arrest.

There is no question but that a "search warrant issued for the premises or effects of a particular person cannot be extended by police officers to include a search of things not belonging to or under the control of that person." *Commonwealth v. Zock*, ____ Pa. ____ , 454 A.2d 35, 38 (1983).

The trial court based its determination as to the admissibility of the knuckles on a finding that because the jacket was not identified prior to the search, the police had "every right to assume it was within the scope of the warrant and to search it to determine whether it contained any contraband." (Trial Court Opinion at 4). In support, *Commonwealth v Wheatley*, 266 Pa. Super. 1, 402 A.2d 1047 (1979), and *Commonwealth v. Sellers*, 236 Pa.

Appendix D

Super. 191, 344 A.2d 689 (1975), are cited. *Wheatley* involved a factual pattern virtually identical to the one before us, but with one crucial variant — the appellant in *Wheatley* was a known resident of the searched premises. This is sufficient under the law to render it inapposite authority. *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973). In *Sellers* this court held that officers serving a warrant are obligated "to inspect areas and objects which [are] apparently part of the premises covered by the warrant and under the control of [the occupant]." *Id.* at 195, 344 A.2d at 691. The question was whether a woman found nude in a bed in the house to be searched was a casual visitor so as to render her belongings immune from search. We concluded that because the woman's clothing was in the bedroom and because she received mail at that address, her presence in the house was more than fortuitous. The divergence from the case at bar is obvious, and the distinctions disqualify *Sellers* as applicable precedent.

In *Commonwealth v. Eichelberger*, ____ Pa. Super. ____ , 508 A.2d 589 (1986), this court, albeit in a different context, reiterated Mr. Justice Stewart's observation in *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971), that "once a line has been drawn which establishes the reasonableness of a police intrusion, 'there is often not a great deal of difference between the situations closest to it on either side' " *Eichelberger* at ____ , 508 A.2d 594.

In this instance the minutiae of the circumstances surrounding examination of the jacket all argue the conclusion that it belonged not to *Cosgrove*, but to appellant, and could not have been "logically determined . . . [to be] part of the general contents of the room." *Zock, supra* at ____ , 454 A.2d 38. Specifically, we note that appellant not Cosgrove was asked about ownership of the jacket. It seems clear from the record that police anticipated its belonging not to the apartment and its residents, Cosgrove

and her three children, but to appellant, of whose status they were already aware, viz. the affidavit.

The facts of this case place it on the wrong side of Justice Stewart's line. Accordingly, we vacate the judgment of sentence.

APPENDIX E — OPINION OF THE LUZERNE COUNTY COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

No. 691 of 1985

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY SCOTT REESE

OPINION

Timothy Scott Reese (Reese) was tried and convicted by a jury of possession of a pair of brass knuckles, a prohibited offensive weapon in violation of § 908 of the Pa. Crime Code[1].

Reese filed a timely motion seeking an arrest of judgment and an alleged six (6) reasons in support of his motion. The matter has been briefed and argued and is now before the Court for resolution.

In his first assignment, Reese contests the Court's denial of his demurrer to the charge. Since Reese rested following the adverse ruling and did not elect to put in a case in defense, the correctness of the ruling on the demurrer is an available preserved and presented issue. *Commonwealth v. Hammock*, 319 Pa. Super. 497, 466 A.2d 653 (1983); *Commonwealth v. Ilgenfritz*, 466 Pa. 346, 347, 353 A.2d 367, 388 (1976).

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1. Act of Dec. 6, 1972, P.L. 1482, No. 334, 18 Pa. C.S.A. § 908.

Appendix E

In reviewing the Court's ruling, we evaluate the sufficiency of the evidence upon the entire trial record. All of the evidence must be read in a light most favorable to the Commonwealth and it is entitled to all reasonable inferences therefrom. The effect of a demurrer is to admit all the facts which the Commonwealth's evidence tends to prove. Also, in passing upon such a motion, all evidence actually received must be considered, whether the trial rulings therein were right or wrong. *Commonwealth v. Tabb*, 417 Pa. 13, 16, 207 A.2d 884, 886 (1965); *Commonwealth v. Scarborough*, 310 Pa. Super. 521, 460 A.2d 310, 312 (1983).

In testing the sufficiency of the evidence, we first accept as true all the evidence and then determine whether that evidence and the inferences arising from it are sufficient to establish the crime charged beyond a reasonable doubt. Considered in the light of the mentioned standards, tests and principles, the salient facts are as follows:

On or about March 22, 1985, a detail of law enforcement officers, armed with a search warrant, went to an apartment located at 93 Main Street, Luzerne Borough, Luzerne County, Pennsylvania. The warrant authorized a search of the apartment and the person of one Tina Cosgrove, the known resident of the apartment. The warrant authorized the search for cocaine and any and all controlled substances and any drug paraphernalia. When the officers entered the apartment, they read the warrant to Mrs. Cosgrove and undertook their search. Present in the apartment beside Mrs. Cosgrove were her three children and two adults, Jerome Dunbar and Reese. Reese was in the kitchen while Dunbar was in the livingroom. During the course of the search which uncovered a quantity of controlled substances, the police observed a black leather jacket hanging over the back of a kitchen chair. Trooper Carl Allen searched the black leather jacket and

discovered in the pocket the metal knuckles involved in this charge. After the knuckles were discovered, Reese acknowledged that was his jacket but never admitted ownership, possession, control or knowledge regarding the metal knuckles. The record also reveals that when Reese was taken from the apartment, that he voluntarily took and wore the jacket from which the knuckles were removed.

While Reese contests the lawfulness of the search and seizure in this case, in testing the sufficiency of the evidence, we assume the validity of that search and seizure. In any event, Reese contends that he was not in actual possession of the weapon and accordingly could only be found guilty if he was in constructive possession of the instrument. In that regard, Reese contends that the Commonwealth failed in its burden of proof because it did not establish by "direct proof" that Reese knew of the presence of the weapon. In support of his position that there must be direct proof of knowledge of the presence of the weapon, Reese cites *Commonwealth v. Burkley*, 297 Pa. Super. 400, 443 A.2d 1182 and *Commonwealth v. Armstead*, 452 Pa. 49, 52, 305 A.2d p. 1, 2 (1973). While the cited cases indicate that there should be "direct proof" of knowledge of the presence of the weapon, we do not feel this requires testimony which actually places the knuckles in the hand of a defendant. The weapon was found in the jacket and it is a fair inference therefrom that the owner of the jacket had knowledge of its presence there. In this case, Reese was standing only a few feet from the jacket when it was seized, he later identified the jacket as his, and, in fact, his ownership and control was further established when he put the jacket on to leave the apartment in the company of the police. Under the circumstances, we feel the evidence was more than sufficient to establish the requisite elements of a constructive possession, that is, that the defendant had the power to control the knuckles and the intent to exercise that control.

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In the second assignment, Reese contests the Court's failure to suppress the search of the jacket and/or the seizure of the knuckles therefrom. Reese contends that since the warrant only authorized a search of Tina Cosgrove and her premises, that it could not lawfully be extended to include a search of items not belonging to or under the control of Cosgrove and, accordingly, could not justify a search of his person or effects. Without reviewing all of the cases cited by counsel, we simply note that the police were authorized to search for cocaine and other controlled substances and pursuant to that authority, had the right to search anywhere in the apartment where they felt such drugs might be secreted. The jacket in the kitchen over a chair was not identified prior to its search as belonging to anyone and so the police had every right to assume it was within the scope of the warrant and to search it to determine whether it contained any contraband. This is not a case where the police have extended the authority of a warrant to search belongings of another such as in *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973). Instead we find the instant facts more closely related to those considered by the Courts in *Commonwealth v. Wheatley*, 266 Pa. Super. 1, 402 A.2d 1047 (1979) and *Commonwealth v. Sellers*, 236 Pa. Super. 191, 344 A.2d 689 (1975). In short, we are satisfied that the suppression Judge appropriately considered search and seizure within the scope of the search warrant issued for the premise.

Reese's third assignment contests the Court's failure to sequester the prosecutor in this case. Prior to the presentation of any testimony, counsel for Reese requested sequestration of the Commonwealth witnesses. After being advised by the Commonwealth that it intended to call two witnesses, Tpr. Brice and the prosecutor, Tpr. Allen, the Court advised counsel that it would sequester any Commonwealth witness except the

prosecutor. It is this ruling that is now contested. In its presentation, the Commonwealth first called Tpr. Brice and by that maneuver, permitted Tpr. Allen to hear the entire evidentiary presentation. Reese now contends that allowing Tpr. Allen to remain in the courtroom while Tpr. Brice testified "enabled Tpr. Allen to shape his testimony in accordance with that given by Tpr. Brice, thereby frustrating the very purpose behind the Court's authority to sequester witnesses. Allowing Tpr. Allen to remain in the courtroom also resulted in the impairment of the defense's ability to cross examine". We disagree.

The question of whether a motion to sequester witnesses should be granted or not is vested within the sound discretion of the trial Judge whose decision will be reversed only for a clear abuse of discretion. *Commonwealth v. Kravitz*, 400 Pa. 198, 161 A.2d 861 (1960). *Commonwealth v. Fields*, 317 Pa. Super. 387, 464 A.2d 375, 382-282 (1983). Nothing in the brief or said at oral argument warrants the conclusion offered by Reese's counsel that Tpr. Allen shaped his testimony. Indeed the record does not contain a scintilla of evidence to warrant that accusation or conlusion. We are also satisfied that the ruling in no way impaired defense counsel's ability to cross examine either of the witnesses.

Reese next contests the denial of his motion in limine to prohibit the Commonwealth from using his prior criminal record for impeachment purposes.[2] We are satisfied that the trial Court

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2. Under the Federal cases, a defendant is required to testify in order to preserve an issue of this kind for review. *Luce v. U.S.*, 36 Cr. L. 3001 (1984). See also *U.S. v. Hunter*, 3rd CA, Hunter, J., 1985, and *People v. Williams*, Calif. Ct. of Appeals, 1st Dist., No. A027346, decided 9/25/85. While the issue has not been precisely presented and determined by our Appellate Courts, we note that the Superior Court in *Commonwealth v. Hill*, supra, stated that a

(Cont'd)

adequately considered and weighed the factors set forth in *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973), and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). There is no question that Reese's burglary conviction was a proper subject for impeachment. *Commonwealth v. Kahley*, 477 Pa. 272, 278, 356 A.2d 745, 761 (1976). The fact that the conviction took place seven years ago when Reese was 19 does not prohibit its use. It is also clear that the nature of the case was such that credibility was an important issue and that the Commonwealth had no other means to directly impeach Reese if he testified. Under all the circumstances, we are satisfied that the issue was fully considered and properly determined.

Defendant also contends that the Court erred when it failed as requested to charge the jury that direct proof that the accused knew of the presence of the knuckles was required. As counsel has noted, the Court is not required to accept the precise language of the points submitted and the Court is free to select its own form of expression. The question is whether the area was adequately, accurately and clearly presented to the jury for their consideration. *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976). We are satisfied that the Court adequately defined the

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pre-trial ruling would allow a defendant to "more intellingently weigh his or her decision to testify" thereby implying that the issue would then be preserved for review whatever decision was made by the defendants. In *Commonwealth v. Flores*, 247 Pa. Super. 140, 371 A.2d 1366 (1977), the defendants contended that a court's ruling that his prior burglary conviction could be used against him if he testified was error and prevented him from testifying an denied him a fair trial. The decision does not indicate whether the defendant testified or not. We feel the Federal Rule should be adopted and applied because it will discourage and prevent the making of motions in limine simply to plant reversible error.

elements of the offense involved and the Commonwealth's burden with regard thereto.

Reese finally contends that the Court's instructions infringed upon his Fifth Amendment rights. This assignment is premised upon the fact that during its instructions the Court read the statutory section including the specific exceptions to the jury. Reese now contends that by indicating to the jury the availability of these affirmative defenses, that a negative inference concerning his failure to testify was created, thereby penalizing him for exercising his privilege against self-incrimination. We are unpersuaded by this argument and find no actual or possible prejudice to Reese from the mere reading of the statutory provisions in this case. That recitation in no way violated Reese's constitutional rights and certainly did not in any way prejudice his right to a full, fair and an impartial trial.

We have considered all of the issues and finding no merit in them, we enter the following:

END OF OPINION.

ORDER IS ATTACHED SEPARATELY AS PAGE NO. 8.

APPENDIX F — SEARCH WARRANT AND AFFIDAVIT OF PROBABLE CAUSE

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF LUZERNE

ss:

SEARCH WARRANT
AND AFFIDAVIT

Warrant Control No.
A 27260

Date of Application
22 MAR 85

Inventory No.
A 27260

(Name of Affiant): Michael L. BRICE PSP
(Police Dept. or Address of Private Affiant):
Region VIII Strike Force, Kingston, PA
(Phone No.): 717-826-2051

being duly sworn (or affirmed) before me according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure and is located at particular premises or in the possession of particular person as described below.

Identify Items to Be Searched For and Seized (be as specific as possible):

Cocaine, and any and all controlled substances listed in

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Schedules I through V of the Controlled Substance, Drug, Device, and Cosmetic Act, as amended June, 1972, also any paraphernalia, records, associated with the distribution of controlled substances.

Specific Description of Premises and/or Persons to Be Searched (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.):

The apartment located on the second floor of a two story wood frame structure, with blue aluminum siding located at 93 Main St., Luzerne. The apartment is assigned as Apt. D and is specifically in the southwest corner of the building; and the person of Tina Cosgrove.

Name of Owner, Occupant or Possessor of Said Premises to Be Searched (If proper name is unknown, give alias and/or description):

Tina Cosgrove

Violation of (Describe conduct or specify statute)

Controlled Substance, Drug, Device and Cosmetic Act, as amended June, 1972

Date of Violation: Divers times and dates

Probable Cause Relief Is Based on the Following Facts and Circumstances:

Michael L. Brice, being duly sworn according to law deposes and says:

1. I am a member of the PA State Police (PSP) employed as a police officer, and presently assigned to the Region VIII Strike Force at Kingston, PA, As a member of the PSP, I am an investigative or law enforcement officer of the Comm. of PA, who is empowered by law to conduct investigations of and to make arrest for violations of the Controlled Substance, Drug,

Appendix F

Device and Cosmetic Act, as amended June, 1972. I have been employed by PSP since March, 1975, and in my capacity as a State Police Officer, I have participated in the investigation and arrest of approximately 75 narcotics traffickers.

2. In February, 1985, your affiant met with an individual who expressed a willingness to cooperate with law enforcement authorities and will be referred to as Confidential Informant. Confidential Informant detailed to your affiant and Cpl. Richard D. MONTROSS, information of drug trafficking, activities of dealers in a multi-county area. This information has been investigated and verified by your affiant and found to be particularly accurate.

RESULT OF SEARCH

Date and Time of Search: 22 March 85 - 8:20 p.m.

Arrest: Yes

Property Seized: Yes - Control No. A 27260

Signature of Person Seizing Property: Michael L. Brice
Badge No.: 244

Other Officers Participating in Search: Cpl. Smith, Tpr. Allen, Cpl. Montross, Tpr. [illegible]

s/ Tpr. Michael L. Brice
Badge No.: 244
District Unit: PSP - Region VIII Strike Force

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Sworn to and subscribed before me this 22nd day of March, 1985

s/ Andrew Barilla, Jr.
ANDREW BARILLA, JR.

Office: Swoyersville Boro. Bldg.
Main & Shoemaker St.
Swoyersville, PA

Appendix F

APPLICATION FOR SEARCH WARRANT
AFFIDAVIT
CONTROL NO. A 27260

Since cooperating with your affiant Confidential Informant has acted for PSP, Region VIII Strike Force, Kingston, and made a purchase of controlled substance, Cocaine. The substance purchased by the Confidential Informant was analyzed by PSP Laboratory Division and found to be a controlled substance as listed in the Act. The above named transaction was planned and executed under the control of your affiant.

The Confidential Informant has also given your affiant particular information relative to a continuing homicide investigation in another county. This information was given to Cpl. Satori, Criminal Section Commander, Troop "N", Fern Ridge. Cpl. Satori advised your affiant that the Confidential Informant's information regarding the investigation was correct, and has furthered the solvibility indicators of the investigation.

In view of the facts and circumstances set forth in this application, your affiant believes that the reliability and confidentiality of the Confidential Informant has been established.

Information available to your affiant states that Tina COSGROVE is presently conducting the sales of controlled substances, Cocaine, from her apartment at 93 Main St., Luzerne, PA. Confidential Informant advised your affiant that this information was received from being present in Apt. D at the 93 Main St. address while COSGROVE conducted the sales of controlled substances during the period 1 February, 1985, to present. Confidential Informant was observed by your affiant, within the past 48 hours, enter the 93 Main St. address. When the Confidential Informant exited,

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your affiant was advised that Cocaine, a controlled substance, was observed in COSGROVE'S apartment.

According to Confidential Informant, one Timmy REESE, an associate of COSGROVE has been observed in Apt. D. at the 93 Main St. address. REESE is a know drug user and has been the target of drug law enforcement investigations of the Region VIII Strike Force at Kingston.

Your affiant asks that a search warrant be issued to search the properties listed in this application, and the person listed be searched for items listed in this application. This application is based on information received by your affiant and investigation conducted by this affiant and believed true and correct to the best of my knowledge.

APPENDIX G — OMNIBUS PRE-TRIAL MOTION IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

CRIMINAL DIVISION

Omnibus Motion

No. 691 of 1985

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff

vs.

TIMOTHY SCOTT REESE,

Defendant

OMNIBUS PRE-TRIAL MOTION
OF TIMOTHY SCOTT REESE

MOTION TO SUPPRESS EVIDENCE

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Your applicant, Timothy Scott Reese, by and through his attorneys, Cappellini, Reinert & Cardone, respectfully represents to the Court as follows:

1. That he is the Defendant in the above-captioned matter.

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2. That he was served with a Criminal Information to the above term and number, charging him with the offense of Prohibited Offensive Weapons, 18 Pa. C.S.A. 908.

3. That the arrest of the Defendant on the above-stated charge arose out of a search for and seizure of evidence at premises situate at 93 Main Street, Luzerne Borough, by officers of the Pennsylvania State Police on March 22, 1985, the date of the application for a warrant to search the said premises.

4. That it is the belief of the applicant and his counsel that the said search and seizure was made in violation of rights secured the applicant by the Fourth and Fourteenth Amendments to the United States Constitution, by Article I, Section 8 of the Pennsylvania Constitution and by the Pennsylvania Rules of Criminal Procedure.

5. That it is the belief of the applicant and his counsel that the Commonwealth will seek to use at trial evidence which was obtained as a result of the said illegal search and seizure to wit, a set of metal knuckles.

6. That the applicant moves to suppress the evidence illegally seized as a result of the said search, to wit, a set of metal knuckles, upon grounds including but not limited to the following:

(a) The said warrant lacked the constitutionally requisite particularity of description to authorize a search of the applicant or his effects in that the warrant named only a Tina Cosgrove as the person to be searched and named only Apartment D, 93 Main Street, Luzerne, as the premises to be searched, which premises are under the ownership, dominion, and/or control of the said Tina Cosgrove; your applicant merely happened to be

on the said premises at the time of the execution of the said warrant. As the said warrant lacked the constitutionally requisite particularity of description as to your applicant, the search of the applicant and/or his effects is an invalid general search.

(b) The said warrant lacked the constitutionally requisite probable cause to authorize a search of the applicant or his effects. Even assuming that probable cause was established to authorize a search of the person and premises of Cosgrove, the property of your applicant could not be searched under the authority of a warrant for the person and/or premises of Cosgrove; to allow such a search would deny the applicant of his Fourth Amendment guarantees with respect to his property, because no magistrate ever decided that probable cause existed for the search of your applicant's person or effects.

(c) The officers executing the said warrant unlawfully extended its scope in that, while the warrant arguably allowed the search of the premises and person of Cosgrove, it could not be extended by the officers to include a search of things not belonging to or under the control of Cosgrove or to cover persons or things not particularly described in the warrant.

(d) The search which was conducted in the case at bar cannot be constitutionally justified under the search incident to a lawful arrest exception to the Fourth Amendment warrant requirement, as a search here preceded your applicant's arrest. Further, as no probable cause existed to arrest Mr. Reese prior to the commencement of the search conducted by the officers, the arrest of Mr. Reese was not a lawful one.

(e) The search conducted in the instant matter could not be constitutionally justified as necessary for the officers' protection,

in that the officers were at no time during the course of the search in fear of their safety, and further, because the applicant's coat, which he could possibly secrete a weapon, was beyond the area of his control.

(f) Your applicant made no attempt to conceal or destroy any contraband at any time during the course of the search, and, as such, no exigent circumstances existed as to justify a search on the basis of that exception to the Fourth Amendment warrant requirement.

(g) At no time did your applicant consent to a search of his effects. As such, the "consent search" exception to the Fourth Amendment warrant requirement is not applicable in the case at bar.

(h) The set of metal knuckles seized from your applicant was not in plain view of the searching officers; on the contrary, they were found in your applicant's coat pocket. As such, the seizure of the metal knuckles cannot be justified under the plain view doctrine.

WHEREFORE, your applicant prays that your Honorable Court order that no articles or items of evidence which were unlawfully observed or seized be received or admitted into evidence, that no testimony or comment be received respecting the same, and that they be suppressed.

Respectfully submitted,

CAPPELLINI, REINERT &
CARDONE

Appendix G

BY: s/ Gifford S. Cappellini
Gifford S. Cappellini, Esq.

BY: s/ Frank W. Nocito
Frank W. Nocito, Esq.
Attorneys for Defendant

APPENDIX H — DECISION OF SUPPRESSION COURT

MR. NOCITO: Pardon me.

THE COURT: Do you intend to present some testimony?

MR. NOCITO: I'd like to make some argument.

THE COURT: I know about argument.

MR. NOCITO: No testimony.

THE COURT: Let's meet at quarter of two in my chambers and we'll have argument on the evidence and the law.

[Whereupon, Court was recessed at 12:18 p.m. and resumed at 1:45 p.m. in Judge's chambers where the following occurred:]

[Argument was presented by Mr. Klemow and Mr. Nocito off the record.]

THE COURT: We'll deny the motion to suppress and further state that there was no denial of any state or constitutional rights of the defendant, nor was there any violation of the United States Constitutional guarantees in the search conducted by the officers and the seizure sure resulting therefrom.

[Discussion off the record.]

[Court adjourned at 2:18 p.m.]

No. 89-1527

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RAILWAY LABOR EXECUTIVES' ASSOCIATION
AND UNITED TRANSPORTATION UNION,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION
COMPANY AND DAKOTA, MINNESOTA AND
EASTERN RAILROAD CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

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Attorneys for Chicago & North Western Transportation Company

May 30, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether § 6 of the Railway Labor Act, 45 U.S.C. § 156, as construed in *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Ass'n*, 491 U.S. ——, 109 S. Ct. 2584 (1989), requires a rail carrier that has agreed to sell part of its rail lines to bargain with its employees' unions over its decision to sell and to postpone the sale pending completion of that bargaining.

RULE 29.1 STATEMENT

Respondent Chicago and North Western Transportation Company is a wholly owned subsidiary of CNW Corporation, which is wholly owned by Chicago & North Western Acquisition Corporation, which is wholly owned by Chicago & North Western Holdings Corporation. Union Pacific Corporation holds 100% of the non-voting UP preferred stock issued by Chicago & North Western Holdings Corporation. Petitioner Chicago & North Western Transportation Company has the following subsidiaries apart from wholly owned subsidiaries within the meaning of this Court's Rule 29.1: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., Transportation Quality Systems, Inc., and C&NW Realco, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1527

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Respondent Chicago and North Western Transportation Company ("C&NW") respectfully submits this brief in opposition to the petition for a writ of certiorari of the Railway Labor Executives' Association ("RLEA") and the United Transportation Union to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

On July 2, 1986, C&NW agreed to sell a railroad line between Winona, Minnesota, and Rapid City, South Dakota, and to assign additional trackage in South Dakota to respondent Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), a newly formed rail carrier (J.A. 45-46, 55).[1] That line had generated substantial losses for several years, had previously been the subject of abandonment proceedings before the Interstate Commerce Commission ("ICC"), and at the time of the sale was in part inoperable due to debilitation of the track (J.A. 47, 54-57, 207, 215-25, 226, 230).

When they learned of the agreement to sell the line, seven of the unions representing C&NW employees served written notices on the C&NW proposing collective agreements that would require the C&NW to give the unions six months' advance notice of a proposed transfer of any of its lines, to provide employees who might be affected by a transfer with the labor protections typically imposed by the ICC on line abandonments, and to renegotiate its sale agreement with DM&E so as to require DM&E to hire all affected employees and apply the labor protections typically imposed by the Commission on mergers or consolidations of rail carriers (J.A. 8, 26-27, 42-43, 62, 188).[2] By serving these notices, ostensibly pursuant to § 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, the unions sought to initiate the Act's "purposely long and drawn out" procedures to settle "major disputes," those involving proposals to enter into or change collective bargaining agreements. *Railway Clerks* v. *Florida E.C. R. Co.*, 394 U.S. 238, 246 (1966).

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[1] "J.A." citations refer to the Joint Appendix in the court of appeals. "Pet." citations refer to the Petition for Certiorari, and "App." citations refer to its Appendices.

[2] The proposed agreements would provide the so-called *Oregon Short Line III* and *New York Dock* protections, the conditions that the ICC typically imposes on rail abandonments and mergers, respectively. See *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979); *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2d Cir. 1979).

The RLA requires the parties to bargain over notices of "an intended change in agreements affecting rates of pay, rules, and working conditions," § 6, and until the Act's major-dispute procedures are exhausted, neither party may unilaterally alter the status quo by resorting to self-help with respect to the subject of the dispute, §§ 2 Seventh, 5 First, 6 & 10, 45 U.S.C. §§ 152 Seventh, 155 First, 156 & 160. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). C&NW conferred with the unions about their proposals, but without prejudice to its contention that the RLA did not require it to bargain with the unions on these subjects (J.A. 62, 188-89, 190-91).

In August 1986, C&NW and DM&E obtained authority to consummate the transaction from the ICC under the Commission's "Ex Parte No. 392" class exemption for line sales under §§ 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505 & 10901.[3] Neither of the petitioners nor any of the other unions representing C&NW employees contested the Commission's authorization of the transaction or asked the Commission to impose labor protective conditions on it.

RLEA initiated this litigation by filing a complaint in the United States District Court for the District of Minnesota on August 16, 1986. The complaint sought a declaratory judgment that C&NW's transfer of the line to DM&E would violate the mandatory bargaining and status quo provisions of the RLA (J.A. 4-5, 11-13). The complaint sought interlocutory and permanent injunctions requiring C&NW to maintain the status quo until it had reached agreements with RLEA's member unions (J.A. 13-14). After the district court denied RLEA's motion

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[3] *Dakota, Minnesota & Eastern R.R.—Acquisition & Operation Exemption*, 51 Fed. Reg. 32260 (Sept. 10, 1986). See *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *rev. denied mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

> support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

In the case at bar, the police were authorized to search for cocaine, controlled substances and drug paraphernalia and pursuant to that authority, had the right to search anywhere in the apartment where they believed such contrabands might be hidden. The facts establish, moreover, that the petitioner's jacket which was in the kitchen draped over a chair, was not identified prior to its search as belonging to anyone, and as a result, the police had every right to assume it was within the scope of the warrant and to search it to determine whether it contained any contraband.

In light of *United States v. Ross, supra*, then the police are not prohibited from searching a visitor's personal effects which are not on the person, and which are located on the premises when a search warrant is being executed and when such property is a part of the general content of the premises and is a plausible repository for the object of the search. To hold otherwise, would render it absolutely impossible for police officers to effectively search a premises. Indeed, where visitors are present, law enforcement officers would be incapable of discerning which items, clothing, and containers could be searched and which could not be searched. Visitors to the premises, moreover could obfuscate the search and confound police by announcing ownership of particular items in order to exempt those items from the scope of the search.

As discussed herein, the Court in *United States v. Ross*, recognized that "[w]hen a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case

of a home . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Id.* at 821-822, 102 S. Ct at 2171. The Court further noted that this rule applies equally to all containers. Accordingly, it would be anomalous to the purpose of the search to require police officers to make the distinction between those articles of clothing and personal property that belong to the resident and those items that belong to the visitor prior to commencing the search. Not only would it be ineffective and unworkable to require law enforcement officers to inquire as to the ownership of various items of personal property, such a requirement would also be unreasonable, and it would be just as unreasonable for police to expect an appropriate response from individuals located on the premises, were police directed to inquire about ownership.

In this connection, Justice William Rehnquist, writing a dissent for this Court in *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), stated, "[a]n absolute bar to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket." Thus, adoption of such a rule would allow visitors to the premises to frustrate the efforts of police by placing contraband among their ownership of various articles of clothing and containers thereby placing those items beyond the purview of the warrant. The Pennsylvania Supreme Court in *Commonwealth of Pennsylvania v. Timothy Scott Reese*, 520 Pa. 29, 549 A.2d 909 (1988) stated that "[w]e cannot sanction any rule that through fraud and gamesmanship erects barriers to the effective and legitimate execution of search warrants."

In sum, it must be noted that the time of the search, the jacket was not being worn by petitioner and, therefore, the jacket cannot be characterized as an extension of Reese's person so as to propel its search into a search of Reese's person. The record reveals furthermore, that Officer Allen simply noticed the jacket

draped over the back of the chair and made a decision to search it in view of the fact that it is a common receptacle where contraband may be secreted.

Accordingly, the issues involved in the instant matter, as well as the resolution of those issues by the Pennsylvania Supreme Court may be read consistently with prior decisions of this Honorable Court and a review of that decision is both unnecessary and unwarranted.

CONCLUSION

Based upon the foregoing law and argument, respondent Commonwealth of Pennsylvania prays that this Honorable Court deny petitioner Timothy Scott Reese's petition for writ of certiorari to review the decision of the Supreme Court of Pennsylvania, which decision became final on January 5, 1990.

Respectfully submitted,

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